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Supreme Court of the United States

OCTOBER TERM, 1935.

No. 28.

PETE DI GIOVANNI AND MARY DI GIOVANNI,
PETITIONERS,

VS.

CAMDEN FIRE INSURANCE ASSOCIATION, A
CORPORATION, RESPONDENT.

RESPONDENT'S REPLY BRIEF.

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No. 28.

PETE DI GIOVANNI AND MARY DI GIOVANNI, PETITIONERS,

VS.

CAMDEN FIRE INSURANCE ASSOCIATION, A CORPORATION, RESPONDENT.

RESPONDENT'S REPLY BRIEF.

I.

STATEMENT.

Petitioners' statement is complete and we make no objection thereto. However, we respectfully suggest that the opinion of the circuit court of appeals presents a somewhat clearer and more concise statement of the facts (Tr. pp. 12 to 14) also 75 Fed. (2d) 808.

BRIEF SUMMARY OF ARGUMENT.

POINT I.

The Primary Object Sought in Respondent's Bill Is Cancellation of These Two Policies of Insurance. This Is a Matter of Original Equity Jurisdiction and Can Be Defeated Only by Showing That There Is an Adequate Remedy at Law.

Cancellation is a remedy available only in equity. There being stated in the bill a cause of action for cancellation, this case comes within the equity jurisdiction of the court. *New York Life Insurance Company* v. *Miller,* (C. C. A. 8) 73 Fed. (2d) 350; *Shane* v. *West Coast Life Insurance Company,* 73 Fed. (2d) 681, 683 (C. C. A. 10); *Louisville N., A. & C. Ry. Co.* v. *Louisville Trust Company,* 174 U. S. 552, 567, 19 S. Ct. 817, 822; *Rich* v. *Braxton,* 158 U. S. 375, 405, 15 S. Ct. 1006, 1017; *Allore* v. *Jewell,* 94 U. S. 506, 511, 24 L. Ed. 260, 264; *Tyler* v. *Savage,* 143 U. S. 79, 95, 12 S. Ct. 340, 345; *Union Pac. Ry. Company* v. *Chicago, R. I. & P. Ry. Co.,* 163 U. S. 564, 600, 16 S. Ct. 1173, 1187; *Watson* v. *Sutherland,* 5 Wall. 74, 18 L. Ed. 580, 582; *Oelrichs* v. *Williams,* 15 Wall. 211, 228, 21 L. Ed. 43, 44; *State of Alabama* v. *State of Arizona,* 291 U. S. 286, 54 S. Ct. 399, 401; *Smyth* v. *Ames,* 169 U. S. 466, 516, 18 S. Ct. 418, 422.

POINT II.

Unless Relief Is Granted Here in Equity, Two Suits at Law Will Be Required to Settle the Issues. It Will Be Less Expensive and More Convenient to Both Parties to Try the Issues of Plaintiffs' Bill in One Action in the Federal Court.

Since petitioner, Mary Di Giovanni, is interested only in the policy on the real property, the two policies could

not be legally combined in one suit in the state court. Section 865, R. S. Mo., 1929. The balance of convenience is in favor of one action in the federal court. That is the final test of equity jurisdiction; *Hale* v. *Allison*, 118 U. S. 56, 72, 77, 23 S. Ct. 244, 250, 252; *First State Bank* v. *Chicago, R. I. & P. Ry. Co.*, 63 Fed. (2d) 585, 590, 591 (C. C. A. 8); *Terrace* v. *Thompson*, 263 U. S. 197, 214, 44 S. Ct. 15, 17.

POINT III.

Respondent Properly Joined the Policy for $3,000.00 and the Policy for $1,500.00 in One Bill in Equity. The Jurisdictional Amount Was, Therefore, Involved.

(A) RESPONDENT'S BILL CHARGES A CONSPIRACY. THIS CONSTITUTES AN EXCEPTION TO THE GENERAL RULE. IT ENTITLES RESPONDENT TO HAVE THE SUMS OF THE TWO POLICIES AGGREGATED FOR THE PURPOSE OF DETERMINING JURISDICTION.

The bill alleges these two policies were procured by petitioners at the same time; that these policies were procured at the time when petitioners also procured four other policies on the building and one other policy on the contents; that all of said policies were procured as a part of a general scheme and plan to overinsure the property, burn it, and collect from the insurance companies; that pursuant thereto, petitioners did burn the property, file proofs of loss claiming a total loss and are demanding the full face of the policies and threatening to sue in the state court unless the insurance companies pay in full. By means of this conspiracy petitioners have tied these claims together so that they should be aggregated in determining the

jurisdictional amount. *Sovereign Camp, W. O. W.*, v. *O'Neill*, 266 U. S. 292, 295, 45 S. Ct. 49, l. c. 50; *McDaniel* v. *Traylor*, 196 U. S. 415, 427, 25 S. Ct. 369, 373; *McDaniel* v. *Traylor*, 212 U. S. 428, 432, 29 S. Ct. 343, 345.

(B) RESPONDENT HAD THE RIGHT TO MAINTAIN ONE ACTION IN EQUITY IN THE FEDERAL COURT FOR CANCELLATION OF BOTH POLICIES. THERE WAS, THEREFORE, INVOLVED THE AGGREGATE OF THESE TWO POLICIES OR $4,500.00 AND MORE THAN THE REQUISITE JURISDICTIONAL AMOUNT.

Both policies are alleged to have been procured at the same time and as a part of the same conspiracy to defraud. The alleged damage under each policy occurred at the same time and in the same fire. Petitioner, Pete Di Giovanni, is interested in both policies. Most of the issues are the same as to both policies. Both policies were, therefore, properly joined in one bill for cancellation and the aggregate amount brings the case within the jurisdiction of the federal court. *Providers' Mutual Life Insurance Company of Philadelphia* v. *Parsons*, 70 Fed. (2d) 863, 864, certiorari denied by this court 55 S. Ct. 95; *New York Life Insurance Company* v. *Jones*, 2 Fed. Supp. 600 (D. C. N. E. D. N. C.); Equity Rule 26 (28 U. S. C. A., Section 723); *Kimel* v. *Missouri State Life Insurance Company*, 71 Fed. (2d) 921, 924 (C. C. A. 10); *Baltimore and Ohio Southwestern Railway Company* v. *United States*, 220 U. S. 94, 106, 31 S. Ct. 368, 371; *Metropolitan Life Insurance Company* v. *Dunne*, 2 Fed. Supp. 165, 166 (D. C. S. D. New York); *City of Dothan, Alabama*, v. *First National Bank of Dothan*, 61 Fed. (2d) 685 (C. C. A. 5); *Geneva Furniture Company* v. *S. Karpen & Bros.*, 238 U. S. 254, 35 S. Ct. 788.

POINT IV.

Respondent Has No Remedy on the Law Side of the Federal Court Which Is the Test As to Whether There Is an Adequate Remedy at Law Preventing the Exercise of Equitable Jurisdiction by a Federal Court.

The case being one of original equity ~~of~~ jurisdiction, the requisite jurisdictional amount being involved (Point III a, b) equity jurisdiction can be defeated only by there being a clear and adequate remedy at law.

Both policies cannot legally be joined in one action in the state court since petitioner, Mary Di Giovanni, is not interested in the policy on the personal property and the state statutes provide actions may be joined only where all the parties are interested in all the causes of action joined. Section 765, R. S. Mo., 1929.

Since separate actions would have to be filed in the state court the jurisdictional amount would not be involved therein to permit removal to the Federal District Court. There is, therefore, no possible remedy on the law side of the federal court which is the test of whether there is an adequate remedy at law. *Leavenworth Savings and Trust Co.* v. *Newman*, 23 Fed. (2d) 835 (C. C. A. 8); *Fish* v. *Kennamer*, 37 Fed. (2d) 243, 247 (C. C. A. 10); *Brown* v. *Guarantee Trust and Safe-Deposit Company*, 128 U. S. 403, 412, 9 S. Ct. 127, 130; *Davis* v. *Wakelee*, 156 U. S. 680, 688, 15 S. Ct. 555, 558; *Barber* v. *Barber*, 21 How. 591, 16 L. Ed. 226, 229; *Henrietta Mills* v. *Rutherford County*, 281 U. S. 121, 126, 50 S. Ct. 270, 272; *Smyth* v. *Ames*, 169 U. S. 466, 516, 18 S. Ct. 418, 422; *Risty* v. *Chicago, R. I. & P. R. R. Co.*, 270 U. S. 378, 388, 46 S. Ct. 236, 240; *City Bank Farmers Trust Company* v. *Schnader*, 291 U. S. 24, 29, 54 S. Ct. 259, 261.

SERIATIM ANSWER TO PETITIONERS' POINTS.

(Following Order in Petitioners' Brief.)

POINT A.

The Circuit Court of Appeals Properly Overruled Petitioners' Motion to Complete the Record.

This motion was not filed until after the opinion was handed down by the circuit court of appeals and was raised only in connection with petitioners' motion for rehearing. We believe it was raised too late. *Burnet* v. *Commonwealth Improvement Company*, 287 U. S. 415, 418, 53 S. Ct. 198, 199; *Lynch* v. *United States*, 292 U. S. 571, 588, 54 S. Ct. 840, 847; *New York Dock Company* v. *Pozman*, 274 U. S. 117, 123, 47 S. Ct. 482, 485.

POINT B.

The Circuit Court of Appeals Properly Held That Complainant Could Maintain Its Bill in Equity Because It Had No Adequate Remedy at Law in the Federal Court.

(a)

There is no danger of all installment policies aggregating a total in excess of $3,000.00 being drawn into the federal court by this decision. Contingent future installments may not be aggregated. *Wright* v. *Insurance Company*, 19 Fed. (2d) 117, (C. C. A. 5) 276 U. S. 602; *Healy* v. *Ratta*, 292 U. S. 263, 271, 54 S. Ct. 700, 704.

The injunction here sought is not to restrain actions already pending in the state court but to protect the jurisdiction of the federal equity court properly in-

voked by respondent. In such situation the federal courts never hesitate to issue the injunction for the protection of their own jurisdiction. *Julian* v. *Central Trust Company*, 193 U. S. 93, 112, 24 S. Ct. 399, 407; *Wells Fargo and Company* v. *Taylor*, 254 U. S. 175, 183, 41 S. Ct. 93, 96; *Looney* v. *Eastern Texas R. Co.*, 247 U. S. 214, 218, 38 S. Ct. 460, 462.

The circuit court of appeals' opinion herein does not interfere with petitioner's right of a trial by a jury. Before the adoption of the Federal Constitution there was no right of a trial by jury in an equitable action for cancellation. Here, if cancellation is not decreed, petitioners will have a right to a jury trial on the law issues. *Liberty Oil Co.* v. *Condon National Bank*, 260 U. S. 235, 242, 43 S. Ct. 118, 121; *American Mills Company* v. *American Surety Company*, 260 U. S. 360, 364, 43 S. Ct. 149, 151; *Bankers* v. *Ford Motor Company*, 69 Federal (2d) 665 (C. C. A. 3rd.).

(b)

Respondent's bill in equity charges petitioners have filed proofs of loss claiming a total loss and demanding the full face of the policies. It further alleges that petitioners are threatening to sue in the state court to recover on said policies and will do so unless restrained by the federal equity court. The allegations on demurrer stand admitted and are sufficient to show a threatened injury. *State of Kansas* v. *State of Colorado*, 185 U. S. 125, 145, 22 S. Ct. 552, 559; *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 593, 43 S. Ct. 658, 663; 36 Stat. 1162, 28 U. S. C. A., Section 379; *Swift and Company* v. *United*

States, 276 U. S. 311, 326, 48 S. Ct. 311, 315; *New Mexico* v. *Standard Oil Company*, 56 Fed. (2d) 973, 976 (C. C. A. 10); *Vicksburg Waterworks Company* v. *Vicksburg*, 185 U. S. 65, 82, 22 S. Ct. 585, 592; Section 865, R. S. Mo., 1929.

(c)

These suits could not legally be joined in the state court, each being less than the jurisdictional amount. There could be no removal to the federal court. There is, therefore, no remedy at law on the law side of the federal court which is the test of there being an adequate remedy at law. *City Bank Farmers Trust Company* v. *Schnader*, 291 U. S. 24, 29, 54 S. Ct. 259, 261; *Risty* v. *Chicago, R. I. & P. Ry. Co.*, 270 U. S. 378, 388, 46 S. Ct. 236, 240; *Smyth* v. *Ames*, 169 U. S. 466, 516, 18 S. Ct. 418; *American Mutual Liability Insurance Company* v. *McDonaugh*, 61 Fed. (2d) 558, 563 (C. C. A. 7th) (certiorari denied 288 U. S. 602).

(d)

1 Statute 82 (Section 267, Judicial Code) 36 Statute 1163, provide no suit in equity may be maintained in a federal court where there is an adequate remedy at law refers to adequate remedy at law in the federal court. *Henrietta Mills* v. *Rutherford County*, 281 U. S. 121, 126, 50 S. Ct. 270, 272.

Furthermore, two suits at law in the federal courts would not be "as satisfactory, complete, prompt, and efficient to attain the ends of justice as the remedy in equity." *Keaton* v. *Little*, 34 Fed. (2d) 396, 398 (C. C. A. 10); *Dawson* v. *Kentucky Distillers and Warehouse*

Company, 255 U. S. 288, 296, 41 S. Ct. 272, 275; *Risty* v. *Chicago, R. I. & P. Ry. Co.*, 270 U. S. 378, 388, 46 S. Ct. 236, 240.

(e)

There is no reason to classify bills for cancellation within the exception where equity jurisdiction is denied in order to prevent interference with the enforcement of state revenue acts, state judgment, and other internal affairs of state government which involve interference with such state government. There is here involved no interference with state government.

(f)

We have already pointed out that this action is primarily for the cancellation of these policies of insurance. It is not a bill of peace and partakes only slightly of the characteristics of such a bill in that the supplemental relief asked in addition to cancellation involves an injunction against prosecuting claims in the state court.

POINT C.

The Circuit Court of Appeals Properly Held There Was Equitable Jurisdiction for Cancellation Reenforced by the Ability to Avoid a Threatened Multiplicity of Suits.

(a)

We have just pointed out this is primarily a bill for cancellation and not a bill of peace. Furthermore, exceptions have been noted to the requirement that there must be a trial and judgment at law before a bill of peace

can be maintained. This should come within the exception since respondent had to sue before a law action was instituted in the state court or it could never secure an injunction in the federal court restraining proceedings in the state court. 36 Stat. 1162, 28 U. S. C. A., Section 379.

POINT D.

The Bill Alleged the Face Value of the Two Policies Was $3,000.00 and $1,500.00 Respectively. The Bill Alleged Petitioners Were Claiming the Total Loss and Demanding the Full Face Value of the Policies. The Jurisdictional Amount Was, Therefore, Involved.

The bill alleges petitioners are demanding the full face of the policies. These allegations must be accepted as true. *Grand Chute* v. *Winegar*, 15 Wall. (U. S. 373, 376).

The fact on a trial respondent might set up and successfully sustain the defense that it is liable only for one-fifth of the total fire does not make that the amount involved since it does not appear to a "legal certainty" that petitioners may not succeed in recovering the full face of the policies as they seek to do. *Schunk* v. *Moline, Milburn & Stoddard Company*, 147 U. S. 500, 504, 13 S. Ct. 416; *Barry* v. *Edmunds*, 6 S. Ct. 501, 116 U. S. 550, 559.

Furthermore, the burden is on the defendant to prove less than the jurisdictional amount is involved. *Heally* v. *Ratta*, 293 U. S. 263, 271, 54 S. Ct. 700, 704; *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322, 333 S. Ct. 529, 532; *Wetmore* v. *Rymer*, 18 S. Ct. 295, 169 U. S. 115, 128; *Put-in-Bay W. L. R. Company* v. *Ryan*, 181 U.

S. 409, 431, 21 S. Ct. 709, 717; *Beacher* v. *Pan American Life Insurance Company*, 73 Fed. (2d) 263, 264 (C. C. A. 5th).

POINT E.

The Circuit Court of Appeals Properly Held the Two Claims Arising under the Two Policies of Insurance Could Be Tied Together for the Purpose of Ascertaining the Amount Involved for Jurisdictional Purposes.

(a and b)

The issues under this heading have been discussed by us under Point III, a and b, to which we refer this court.

ARGUMENT.

POINT I.

The Primary Object Sought in Respondent's Bill Is the Cancellation of These Two Policies of Insurance. This Is a Matter of Original Equity Jurisdiction and Can Be Defeated Only By Showing That There Is an Adequate Remedy At Law.

In the opinion of the circuit court of appeals herein (Tr. p. 16) the court cites the case of *New York Life Insurance Company* v. *Miller*, (C. C. A. 8) 73 Fed. (2d) 350, as sustaining the proposition that "the right to maintain an equitable action to rescind or cancel a contract of insurance, because of false representation made by the insured to induce its execution, where there is no adequate remedy at law, is well recognized. (Citing many cases.)"

In the case of *Shane* v. *West Coast Life Insurance Company*, 73 Fed. (2d) 681, the Circuit Court of Appeals for the 10th Circuit ruled the same way citing numerous authorities at page 683.

In the case of *Louisville, N. A. & C. Ry. Co.* v. *Louisville Trust Company*, 174 U. S. 552, 567, 19 S. Ct. 817, this court said, l. c. 822:

> "The demurrers to the bill for want of equity were rightly overruled, and were not insisted on in this court. The object of the bill was that the guaranty upon a great number of negotiable bonds, which might otherwise pass into the hands of *bona*

fide purchasers, might be cancelled, and suits upon the guaranty restrained, because of facts not appearing upon its face. The relief sought could only be had in a court of equity. *Peirsoll* v. *Elliott*, 6 Pet. 95, 98; *Grand Chute* v. *Winegar*, 15 Wall. 373, 376; *Robb* v. *Vos*, 155 U. S. 13, 15 Sup. Ct. 4; *Springport* v. *Bank*, 75 N. Y. 397; *Fuller* v. *Percival*, 126 Mass. 381."

To the same effect see *Rich* v. *Braxton*, 158 U. S. 375, 405, 15 S. Ct. 1006, l. c. 1017.

In the case of *Allore* v. *Jewell*, 94 U. S. 506, 511, 24 L. Ed. 260, this court said, l. c. 264:

> "'If these deeds were obtained by the exercise of undue influence over a man whose mind had ceased to be the safe guide of his actions, it is against conscience for him who has obtained them to derive any advantage from them. It is the peculiar province of a court of conscience to set them aside. That a court of equity will interpose in such a case, is among its best settled principles.' *Harding* v. *Handy*, 11 Wheat. 125."

Further, the petition reveals other grounds of equitable jurisdiction, to-wit: fraud, injunction and avoidance of a multiplicity of suits. These elements are fundamental grounds for equitable relief. In the case of *Tyler* v. *Savage*, 143 U. S. 79, 95, 12 S. Ct. 340, this court in holding equity had jurisdiction where similar equitable relief was asked, said, l. c. 345:

> "Thus there were in the case, as ingredients to support the jurisdiction of equity, discovery, account, fraud, misrepresentation, and concealment. Story, Eq. Jur., Sections 64k, 67, 184, 191, *Jones* v. *Bolles*, 9 Wall. 364, 369."

To obtain justice and do equity, this court has persistently refused to permit equitable remedies to become circumscribed and limited. The rule is well stated by this court in the case of *Union Pac. Ry. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 163 U. S. 564, 600, 16 S. Ct. 1173, as follows, l. c. 1187:

> "It must not be forgotten that, in the increasing complexities of modern business relations, equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them. As has been well said equity has contrived its remedies 'so that they shall correspond both to the primary right of the insured party, and to the wrong by which that right has been violated,' and 'has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, or to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrongs are constantly committed.' Pom., Eq. Jur., Section 111."

In the case of *Watson* v. *Sutherland*, 5 Wall. 74, 18 L. Ed. 580, this court in upholding the issuance of an injunction to prevent the levies of execution on a number of judgments on property of an innocent third person said, l. c. 582:

> "The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend altogether upon the character, as disclosed in the pleadings."

The primary object of respondent's bill in equity is to obtain cancellation of these two policies of insurance.

Such a decree would not only destroy the policies themselves as evidence, but would also establish their invalidity so that no future action could be maintained upon claimed contracts of insurance arising out of the transactions here in issue. Aside from the other equitable grounds of relief which we have mentioned, cancellation alone is sufficient to establish the jurisdiction of the federal equity court. We believe this case comes squarely within the law as declared by this court in the case of *Oelrichs* v. *Williams*, 15 Wall. 211, 228, 21 L. Ed. 43, where this court said, l. c. 44:

> "The direct proceeding in equity will save time, expense and a multitude of suits, and settle the rights of all concerned in one litigation. Besides, there is an element of trust in the case, which, wherever it exists always confers jurisdiction in equity."

In the case of *Smyth* v. *Ames*, 169 U. S. 466, 516, 18 S. Ct. 418, this court said, l. c. 422:

> "But if the case, in its essence, be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper circuit court of the United States whenever jurisdiction attaches by reason of diverse citizenship, or upon any other ground of federal jurisdiction. *Payne* v. *Hook*, 7 Wall. 425, 430; *McConihay* v. *Wright*, 121 U. S. 201, 205, 7 S. Ct. 940."

In the case of *State of Alabama* v. *State of Arizona*, 291 U. S. 286, 290, 54 S. Ct. 399, this court said, l. c. 401:

> "There is no test or rule of general application by which to determine whether a complaint in equity is multifarious. That question is to be de-

cided by the court in the exercise of sound discretion having regard to the facts alleged, circumstances disclosed, and the character of the relief sought. *Oliver* v. *Pratt*, 2 How. 333, 411, 11 L. Ed. 622; *Nelson* v. *Hill*, 5 How. 127, 132, 12 L. Ed. 81; *Shields* v. *Thomas*, 18 How. 253, 259, 15 L. Ed. 368; *Fitch* v. *Creighton*, 24 How. 159, 163, 164, 16 L. Ed. 596; *Brown* v. *Guarantee Trust & Safe-Deposit Co.*, 128 U. S. 403, 410, 9 S. Ct. 127, 32 L. Ed. 468."

Under the above authorities it seems clear to us that the allegations of respondent's bill bring this case squarely within the original equity jurisdiction of the federal court. The jurisdictional amount is involved and there is no adequate remedy at law, as we will point out hereinafter. (Points III and IV.)

POINT II.

Unless Relief Is Granted Here in Equity Two Suits at Law Will Be Required to Settle the Issues. It Will Be Less Expensive and More Convenient to Both Parties to Try the Issues of Plaintiff's Bill in One Action in the Federal Court.

In the case at bar it appears unless this court holds there is federal jurisdiction of this bill in equity the respondent will be vexed by two separate suits in the state court on these policies of insurance. These two policies were taken out at the same time and under the same circumstances rendering the main issues in the two separate suits identical; the suit in equity will, therefore, avoid a multiplicity of suits. We have already pointed out that the nature of the allegations in respondent's bill and the relief asked bring it within the original equity jurisdiction of the court. It is more economical, con-

venient, prompt and effective to try this matter in one suit in the United States District Court in the city where the policy was taken out and the fire occurred and where the witnesses live than to try two different suits in jurisdictions chosen by petitioners which may be away from the vicinity of the fire and the residences of the witnesses. Petitioners will be subjected to trying the equitable issues first even in the state court. The two cases would no doubt be tried so close together that the first would not become *res adjudicata* before the second one was tried.

In the case of *Hale* v. *Allinson*, 188 U. S. 56, 23 Sup. Ct. Rep. 244, the court in laying down the test as to when jurisdiction in equity should be exercised, declared the law as follows, l. c. 250 (188 U. S. l. c. 72):

> "In any case where the facts bring it within the possible jurisdiction of the court, according to the view taken by it in regard to such facts, the decision must depend largely upon the question of the reasonable convenience of the remedy, its effectiveness, and the inadequacy of the remedy at law."

l. c. 252 (188 U. S. l. c. 77):

> "Cases in sufficient number have been cited to show how divergent are the decisions on the question of jurisdiction. It is easy to say it rests upon the prevention of a multiplicity of suits, but to say whether a particular case comes within the principle is sometimes a much more difficult task. Each case, if not brought directly within the principle of some preceding case, must, as we think, be decided upon its own merits and upon a survey of the real and substantial convenience of all parties, the

adequacy of the legal remedy, the situations of the different parties, the points to be contested and the result which would follow if jurisdiction should be assumed or denied; these various matters being factors to be taken into consideration upon the question of equitable jurisdiction on this ground, and whether within reasonable and fair grounds the suit is calculated to be in truth one which will practically prevent a multiplicity of litigation, and will be an actual convenience to all parties, and will not unreasonably overlook or obstruct the material interests of any."

In the case of *First State Bank* v. *Chicago, R. I. & P. Ry. Co.*, 63 Fed. (2d) 585 (C. C. A. 8th) the court said, l. c. 590:

"The avoidance of unnecessary suits should be much desired by litigants and taxpayers. In *Munson Inland Lines, Inc.*, v. *Insurance Co. of North America*, (D. C. N. Y.) 38 Fed. (2d) 269, 271, Judge Woolsey clearly expresses such desire, 'that the avoidance of multiplicity of suits by every device, which is jurisdictionally possible and practically convenient, should be encouraged, and should be one of the main objectives of procedural administration, and of decisions by courts in practice cases.' And the same judge in *Irving Trust Co.* v. *Marine Midland Trust Co. of New York*, (D. C. N. Y.) 47 Fed. (2d) 907, 908, states that 'multiplicity of suits involving issues which can be conveniently tried together, is something that equity holds in abhorrence."

l. c. 591:

"Surely a suit could be brought in equity under these circumstances to cancel void instruments so that in this case there is a well-recognized ground of equity jurisdiction outside of multiplicity of suits. The relief sought against all the defendants was the same, to-wit, the cancellation of these bills of lading.

> The defenses which could be interposed were the same, the legal questions were the same. The operation of the acts of defendants upon plaintiff were identical in their effect upon plaintiff's rights."

In the case of *City of Walla Walla* v. *Walla Walla Water Company*, 172 U. S. 1, 19 S. Ct. Rep. 77, the court had before it an action to restrict the city from violating its covenant not to erect a competing waterworks, to the plaintiff. A demurrer to the bill was filed below and overruled. In affirming such action by holding the case cognizable in equity, this court said, l. c. 82 (172 U. S. l. c. 12):

> "This court has repeatedly declared in affirmance of the generally accepted proposition that the remedy at law, in order to exclude a concurrent remedy in equity, must be as complete, as practical, and as efficient to the ends of justice and its prompt admission, as the remedy in equity. *Boyce* v. *Grundy*, 3 Pet. 210, 215; *Ins. Co.* v. *Bailey*, 13 Wall. 616, 621; *Kilbourne* v. *Sunderland*, 130 U. S. 505, 514, 9 Sup. Ct. 594; *Tyler* v. *Savage*, 143 U. S. 79, 95, 12 Sup. Ct. 340."

It is our contention that the legal remedy in a state court—there being no legal remedy in the federal court—is not an adequate legal remedy within the decisions of this court aside from the fact that the legal remedy to defeat federal equity jurisdiction must be a legal remedy on the law side of the federal court. We submit the situation here does not measure up to the test set by this court in the case of *Terrace* v. *Thompson*, 263 U. S. 197, 214, 44 S. Ct. 15, where this court said, l. c. 17:

> "But the legal remedy must be as complete, practical and efficient as that which equity could

afford. *Boise Artesian Water Co.* v. *Boise City*, 213 U. S. 276, 281, 29 Sup. Ct. 426, 53 L. Ed. 796; *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 11, 12, 19 Sup. Ct. 77, 43 L. Ed. 341."

POINT III.

Respondent Properly Joined the Policy for $3,000.00 and the Policy for $1,500.00 in One Bill in Equity. The Jurisdictional Amount Was Therefore Involved.

(A) RESPONDENT'S BILL CHARGES A CONSPIRACY. THIS CONSTITUTES AN EXCEPTION TO THE GENERAL RULE AND ENTITLES RESPONDENT TO HAVE THE SUMS OF THE TWO POLICIES AGGREGATED FOR THE PURPOSE OF DETERMINING JURISDICTION.

We direct attention to the allegations of the petition on pages 3 and 4 of the transcript wherein respondent charges that these and certain other policies issued by other companies were procured by petitioners as a part of a general scheme and plan to defraud insurance companies by over-insuring the property and setting the same on fire. It is charged that the policies were procured from respondent under the representation no other insurance would be taken on the property. (Tr. p. 3.) It further charges, that petitioners set fire to this property; that petitioners have filed proofs of loss claiming a total loss of the property and demanding the full face of these policies. It is further charged that unless relief is granted in this action, petitioners will file two suits at law in the state court, "as a means of consummating the said fraudulent purpose, scheme, and plan of the said respondents * * *" (Tr. p. 4.)" These allegations clearly charge conspiracy on the part of the defendants. The circuit court of appeals so held (Tr. p. 15) and petitioners

do not here claim otherwise. By means of this conspiracy, the petitioners have tied these claims together so that respondent is entitled to have the sums of the two policies aggregated for the purpose of determining the issue of jurisdiction. Where there is a charge of conspiracy, as here, the case falls within a well-recognized exception to the general rule that different contracts may not ordinarily be aggregated in determining jurisdiction.

In the case of *Sovereign Camp, W. O. W.*, v. *O'Neill*, 266 U. S. 292, 45 S. Ct. Rep. 49, the situation was very similar to the one at bar. A suit was brought in equity by the sovereign camp against twenty-five of its members, charging them with entering into a conspiracy to have themselves elected delegates to a session of the Sovereign Camp, where it was decided they had not been legally elected and were not entitled to sit as delegates. It was further alleged that, pursuant to said agreement, these twenty-five defendants had instituted twenty-five different suits in a local court of Texas to recover amounts ranging from $987.00 to $1,170.00 as *per diem* and mileage for attendance at the Sovereign Camp. The bill then prayed for an injunction against the prosecution of these suits. Defendants moved to dismiss on the ground the jurisdictional amount was not involved to give jurisdiction based solely on the diversity of citizenship. In denying such motion, this court, speaking through Mr. Justice Sanford, said, l. c. 50 (266 U. S. l. c. 295):

"Exception to this general rule was, however, recognized in *McDaniel* v. *Traylor*, 196 U. S. 415, 427, 25 S. Ct. 369, 49 L. Ed. 533. There the heirs of one Hiram Evans, an intestate, brought suit in

the circuit court against several defendants to enjoin the enforcement of claims that had been allowed as liens upon his real estate by orders of a probate court. Each claim was less than the requisite jurisdictional amount, but their aggregate exceeded that sum. The bill alleged that these claims were not debts of the intestate, but that the defendants had conspired and confederated with the administrator to secure their payment out of the estate, and that the orders allowing them had been procured as the result of the conspiracy and the fraud practiced in pursuance thereof. This court reversed a decree of the circuit court dismissing the bill, on demurrer, for want of jurisdiction, and held that, on the face of the bill, the value of the matter in dispute was 'the aggregate amount of the claims fraudulently procured by the defendants acting in combination to be allowed in the probate court as claims against the estate.' In the opinion, after referring to the class of cases to which *Walter* v. *Northwestern R. Co.* belonged, the court said:

> 'The case before us, however, is presented by the bill in an entirely different aspect. The case may be regarded as exceptional in its facts, and may be disposed of without affecting former decisions. There is no dispute as to the amount of any particular claim. So far as the bill is concerned, if any one of the specified claims is good against the Estate of Hiram Evans, then all are good. • • • The matter in dispute is whether the lands • • • can be sold to pay *all* the claims, *in the aggregate,* which the defendants, by *combination* and *conspiracy,* procured the probate court to allow against the Estate of Hiram Evans. The essence of the suit is the alleged fraudulent combination and conspiracy to fasten upon that estate a liability for debts of John Evans, which were held by the defendants and which they, acting in combination, procured, in co-

operation with James Evans, to be allowed as claims against the Estate of Hiram Evans. By reason of that combination, resulting in the allowance of all those claims in the probate court, as expenses of administering the Estate of Hiram Evans, the defendants have so tied their respective claims together as to make them, so far as the plaintiffs and the relief sought by them are concerned, *One* claim. The validity of all the claims depends upon the same facts. The lien on the lands which is asserted by each defendant has its origin as well in the combination to which all were parties, as in the orders of the probate court, which, in furtherance of that combination, were procured by their joint action."

And in *McDaniël v. Traylor*, 212 U. S. 428, 433, 29 S. Ct. 343, 344 (53 L. Ed. 584)—on a second appeal—in affirming a decree of the circuit court, made on return of the case, again dismissing the suit for want of jurisdiction, upon a finding that the allegation that the defendants had conspired in procuring the allowance of the claims had not been established, it was said:

'As we have already seen, it was fraudulent combination and conspiracy which united the claims and made the aggregate of the claims the matter in dispute. By reason of that combination, we decided the claims were "so tied" together as to make them "so far as the plaintiffs and the relief sought were concerned, one claim."'

We find that under the allegations of the present bill the case comes fairly within the reason of the exception recognized in the McDaniel cases. It is not only alleged that the defendants' claims are without foundation, but that they originated and are being prosecuted in the state court in pursuance of an agreement and conspiracy to embarrass and

attempt to ruin the society. There is no dispute as to the amount of any particular claim; and the validity of all of them depends upon the same issue. A conspiracy to prosecute, by concert of action, numerous baseless claims against the same person for the wrongful purpose of harassing and ruining him partakes of the nature of a fraudulent conspiracy; and in a suit to enjoin them from being separately prosecuted, it must likewise be deemed to tie together such several claims as one claim for jurisdictional purposes, making their aggregate amount the value of the matter in controversy. We conclude, therefore, that, on the face of the bill, the district court had jurisdiction of the suit by reason of the diversity of citizenship and the amount in controversy."

See, also, *McDaniel* v. *Traylor*, 196 U. S. 415, 427, 25 S. Ct. 369, l. c. 373, and the same case on its second appearance in this court 212 U. S. 428, 433, 29 S. Ct. 343, 345.

(B) RESPONDENT HAD THE RIGHT TO MAINTAIN ONE ACTION IN EQUITY IN THE FEDERAL COURT FOR THE CANCELLATION OF BOTH POLICIES. THERE WAS, THEREFORE, INVOLVED THE AGGREGATE OF THESE TWO POLICIES FOR $4,500.00 AND MORE THAN THE REQUISITE JURISDICTIONAL AMOUNT.

Even in the absence of allegations of conspiracy which are here present, we believe respondent had the right to join these two policies in one bill for cancellation in equity. If that is true, then the jurisdictional amount is here involved. In the case of *Providers Mutual Life Insurance Company of Philadelphia* v. *Parsons*, 70 Fed. (2d) 863, the Circuit Court of Appeals for the Fourth Circuit (certiorari denied by this court, 55 S. Ct. 95) said, l. c. 684:

I. JURISDICTION OF THE COURT. This was based solely on diverse citizenship of the parties (28 U. S. C. A., Section 41 (1)) which is limited to cases involving more than $3,000.00 in controversy exclusive of interest and costs. Neither policy was in principal amount for more than $3,000.00, one being for $2,500.00, and the other for $2,000.00; but the two combined exceed the statutory minimum. In our opinion, the requirements of the statute are met in this case. It has been so held in similar situations by several district courts. *New York Life Insurance Co.* v. *Jones*, 2 Fed. Supp. 600 (D. C. W. D. N. C.); *Mutual Life Insurance Company* v. *Rose*, 294 Fed. 122 (D. C. E. D. Ky.), reversed on other grounds (C. C. A.) 19 Fed. (2d) 280; *Metropolitan Life Insurance Company* v. *Dunne*, 2 Fed. Supp. 165 (D. C. E. D. N. Y.). Compare *New York Life Insurance Company* v. *Marshall*, (D. C.) 21 Fed. (2d) 172; *Id.* (C. C. A.) 23 Fed. (2d) 225; *Columbian National Life Insurance Company* v. *Harrison*, 12 Fed. (2d) 986 (C. C. A. 6). The object of the statutory limitation as to amount is intended merely to prevent invoking federal jurisdiction where the amount in controversy is not substantial. While it has been held that separate claims of two or more plaintiffs, each less than the jurisdictional amount, may not be combined to confer jurisdiction (*Lion Bonding and Surety Company* v. *Karatz*, 262 U. S. 77, 86, 43 S. Ct. 480, 67 L. Ed. 871), nevertheless, a single plaintiff having several claims, each less than the jurisdictional amount, may properly combine them for the purpose of establishing the requisite amount in controversy where they can properly be joined in one suit or action. Hughes, Fed. Practice, Vol. I, Sections 412, 485; *Yates* v. *Whyel Coke Co.*, 221 Fed. 603, 606 (C. C. A. 6); *Hartford Fire Insurance Company* v. *Erie Railway Company*, (C. C.) 172 Fed. 899; *Massachusetts Protective Ass'n* v. *Kittles*, 2 Fed. (2d) 211 (C. C. A. 5); *Baltimore & O. S. W. R. Co.* v. *United States*, 220 U. S. 94, 31 S. Ct. 368, 55

L. Ed. 384. There is no objection to joining in one equity suit both policies for purposes of cancellation, as this is entirely permissible under Equity Rule 26 (28 U. S. C. C. A., Section 723)."

In the case of *New York Life Insurance Company* v. *Jones*, 2 Fed. Supp. 600, the District Court for the Northeastern District of North Carolina said, l. c. 600:

"Equity Rule 26 (28 U. S. C. A., Section 723) provides: 'The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant.'

28 U. S. C. A., Section 41 (1), confers jurisdiction on the United States District Court where there is diversity of citizenship if the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00. This provision applies to actions at law and suits in equity. Cyc. of Fed. Pro., Section 56; *Farmers' & Merchants' Bank of Richmond*, (D. C. N. C.) 274 Fed. 235. The authorities hold that the amount in dispute is the sum of the claims in all the counts upon causes of action properly joined. *Stanley* v. *Board of Supervisors of Albany County*, (C. C. N. Y.) 15 Fed. 483, affirmed 121 U. S. 535, 7 S. Ct. 1234, 30 L. Ed. 1000; *Hartford Fire Insurance Company* v. *Erie*, (C. C.) 172 Fed. 899.

In *B. & O. Southwestern Railroad Company* v. *United States*, 220 U. S. 94, 31 S. Ct. 368, 55 L. Ed. 384, eleven actions at law were instituted to recover penalties, but the cases were consolidated by the trial court. Jurisdiction was challenged because the amount involved in each case was only $1,000.00, when consolidated the amount was $5,500.00, and the court held it had jurisdiction. *Heffner* v. *Gwynne-*

Treadwell Cotton Co., (C. C. A.) 160 Fed. 635; *Schunk* v. *Moline, Milburn & Stoddard Co.*, 147 U. S. 500, 13 S. Ct. 416, 37 L. Ed. 255; *Yates* v. *Whyel Coke Co.*, (C. C. A. 6th) 221 Fed. 603; *Edwards* v. *Bates County*, 163 U. S. 269, 16 S. Ct. 967, 41 L. Ed. 155."

In the case of *Kimel* v. *Missouri State Life Insurance Company*, 71 Fed. (2d) 921, the United States Circuit Court of Appeals for the Tenth Circuit in a law action said, l. c. 924:

> "Where the plaintiff has several demands against the defendant which he may join in one action, the aggregate of those demands exclusive of interests and costs is the amount in controversy."

In the case of *Baltimore & Ohio Southwestern Railroad Company* v. *United States*, 220 U. S. 94, 106, 31 S. Ct. 368, this court said, l. c. 371:

> "The point is made in the brief that this court has no jurisdiction, because the amount involved in the cases embraced in these writs of error was only $1,000.00. The court, whether properly, consolidated all the cases (Rev. Stat., Section 921, U. S. Comp. Stat., 1901, p. 685) and, as consolidated, the amount of the possible penalties sued for in the eleven actions was fifty-five hundred dollars."

See, also, *Metropolitan Life Insurance Company* v. *Dunne*, 2 Fed. Supp. 165, 166 (D. C. S. D. New York).

We have found only two cases which at first blush seem to hold contrary to the above. In the case of *City of Dothan, Ala.*, v. *First National Bank of Dothan*, 61

Fed. (2d) 685, the Circuit Court of Appeals for the 5th Circuit held that the second equitable action, involving only a thousand dollars, could not be joined to another action already pending in a federal equity court because it was a separate action and did not involve the jurisdictional amount. We believe that decision is based on the fact the two actions were unrelated and, therefore, not properly joined. The court decided the second action, l. c. 686, as "a liability wholly different from that asserted against the original defendant," and l. c. 687, "The separate and distinct equitable cause of action asserted by the amendment, etc."

The other case to which we refer is the decision of this court in the case of *Geneva Furniture Manufacturing Company* v. *S. Karpen & Bros.*, 238 U. S. 254, 35 S. Ct. 788, where this court held that part of the suit was brought under the patent law and therefore properly in the federal court. The court then held that the remainder of the action did not arise under the patent law. The court held simply that the court could not take jurisdiction of the second suit against the defendant without its consent save in a district of its residence or that of a plaintiff. (Jud. Code, Section 51.) There is no such issue here and since the cancellation of both policies and an injunction against suits thereon in the state court are matters of original equity jurisdiction which may properly be joined under Equity Rule 26, we submit, aside from the allegation of conspiracy, the jurisdictional amount is here involved.

POINT IV.

Respondent Has No Remedy on the Law Side of the Federal Court Which Is the Test of Whether There Is an Adequate Remedy at Law Preventing the Exercise of Equity Jurisdiction by a Federal Court.

In the case at bar, actions at law on these two policies could not be joined in one suit. The statutes of Missouri provide. All parties must be interested in all causes of action joined at law. Sec. 865, R. S. Mo., 1929 (set out in full under Point C (b) *infra*).

Here petitioner, Mary Di Giovanni, has no interest in any recovery under the policy insuring the personal property. Under the Missouri statutes actions may be joined only where all parties are interested in all the actions so joined. Since that situation does not here exist, two suits would necessarily have to be brought in the state court, neither of which would be removable to the federal court. There is a common point of litigation in the two suits since the issues in both are identical except as to the measure of damages and the issue of whether petitioner, Mary Di Giovanni, participated in the fraudulent conspiracy and thereby is debarred of recovery. Although these actions cannot be joined at law they can be joined in equity in this court.

In the case of *Leavenworth Savings and Trust Company* v. *Newman*, 23 Fed. (2d) 835, the Circuit Court of Appeals for the Eighth Circuit had before it an appeal from the District Court for the Western District of Missouri. Suit had been instituted in equity against stockholders of the mortgagor company on guaranty agreements

with a prayer for an accounting and for the determination of liability of each of the defendants. This court dismissed the bill. In reversing the court with instructions to reinstate the bill, the United States Circuit Court of Appeals held each guaranty agreement was part of the same transaction and the matter was properly brought in equity. In so holding, the court said, l. c. 838:

> "In the case at bar, some of the numerous questions involved are of equitable cognizance; many of them are common to all of the defendants. Each defendant is further interested in the amount recovered from each of the codefendants. The remedy at law available to plaintiff is not as prompt, practical and efficient to attain the ends of justice as a suit in equity. On the face of the bill, at least, the convenience of both plaintiff and defendants will be best subserved by a single suit in equity. Under such circumstances the avoidance of a multiplicity of suits is a sufficient and valid reason for joining the defendants in a single equitable suit. *Hayden* v. *Thompson*, 71 Fed. 60 (C. C. A. 8); *Wyman* v. *Bowman*, 127 Fed. 257 (C. C. A. 8); *Lake Charles Rice Milling Co.* v. *Pacific Rice Growers' Ass'n*, (C. C. A.) 295 Fed. 246."

In the case of *Fish* v. *Kennamer*, 37 Fed. (2d) 243, the United States Circuit Court of Appeals for the 10th Circuit in an ejectment action where numerous claimants were permitted to intervene, said l. c. 247:

> "It has been held, by the Supreme Court of the United States, to be impracticable to lay down any fixed, unbending rule as to what constitutes multifariousness or misjoinder of causes of action. *Oliver* v. *Peath*, 3 How. 411 (11 L. Ed. 622); *Gaines* v. *Chew*, 2 How. 619 (11 L. Ed. 402); *Barney* v. *Latham* (103 U. S. 205, 26 Ed. 514), October Term, 1880-1 • • •."

In the case of *Brown* v. *Guarantee Trust & Safe-Deposit Company*, 128 U. S. 403, 412, 9 S. Ct. 127, this court said, l. c. 130:

> "The case against one defendant may be so entire as to be incapable of being prosecuted in several suits; and yet some other defendant may be a necessary party to some portion only of the case stated. In the latter case, the objection of multifariousness cannot be allowed to prevail. *Attorney-General* v. *Poole*, 4 Mylne & C. 17, 31; *Turner* v. *Robinson*, 1 Sim. & S. 313; *Attorney-General* v. *Cradock*, 3 Mylne & C. 85. It is not indispensable that all the parties should have an interest in all the matters contained in the suit; it will be sufficient if each party has an interest in some material matters in the suit, and they are connected with the others. *Addison* v. *Walker*, 4 Younge & C. 442; *Parr* v. *Attorney-General*, 8 Clark & F. 435; *Worthy* v. *Johnson*, 8 Ga. 238."

In the state law court respondent would have to establish the participation of petitioner, Mary di Giovanni, as well as Pete di Giovanni in order to maintain its defense.

The remedy in a state court is, therefore, wholly inadequate within the ruling of this court in the case of *Davis* v. *Wakelee*, 156 U. S. 680, 688, 15 S. Ct. 555, where this court said, l. c. 558:

> "In the uncertainty which appears to exist in that state as to whether a complaint setting forth all the facts would or would not be demurrable, we think it may be fairly said that the remedy at law is not so plain or clear as to oust a court of equity of jurisdiction. It is a settled principle of equity jurisprudence that, if the remedy at law be doubtful,

a court of equity will not decline cognizance of the suit. *Boyce's Ex'rs* v. *Grundy*, 3 Pet. 210; *Watson* v. *Sutherland*, 5 Wall. 74, 79; *Rathbone* v. *Warren*, 10 Johns. 587; *King* v. *Baldwin*, 17 Johns. 384; *Insurance Co.* v. *Fisk*, 1 Paige 90; *Teague* v. *Russell*, 2 Stew. (Ala.) 420; *Southhampton Dock Co.* v. *Southhampton Harbour & Pier Board*, L. R. 11, Eq. 254; *Weymouth* v. *Boyer*, 1 Ves. Jr. 416. Where equity can give relief, plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law."

There is no possible way for respondent to get into the law side of the federal court. There is, therefore, no legal remedy on the law side of the federal court which is the test of an adequate remedy at law defeating federal equity jurisdiction. In the case of *Barber* v. *Barber*, 21 Howard 591, 16 L. Ed. 226, this court said, l. c. 229:

"'There is no objection to equity jurisdiction in the courts of the United States that there is a remedy under the local law. For the equity jurisdiction of the federal courts is the same in all of the states, and is not affected by the existence or nonexistence of an equity jurisdiction in the state tribunals.'"

In the case of *Henrietta Mills* v. *Rutherford County*, 281 U. S. 121, 126, 50 S. Ct. 270, this court in an opinion by Mr. Chief Justice Hughes, refused to exercise equitable jurisdiction in a case brought under a state statute of a remedial character attempting to enlarge the equity jurisdiction of the federal court. In so ruling, however, the court said, l. c. 272:

"The act of Congress with respect to the existence of such a remedy has reference to the ade-

quacy of the remedy on the law side of the federal courts (*Smyth* v. *Ames,* 169 U. S. 466, 516, 18 S. Ct. 418, 42 L. Ed. 819; *Chicago, B. & Q. Railway Company* v. *Osborne,* 265 U. S. 14, 16, 44 S. Ct. 431, 68 L. Ed. 878; *Risty* v. *Chicago, R. I. & P. Ry. Company,* 270 U. S. 378, 388, 46 S. Ct. 236, 70 L. Ed. 641) * * *"

In the case of *Smyth* v. *Ames,* 169 U. S. 466, 18 Sup. Ct. Rep. 418, this court, speaking through Mr. Justice Harlan, declared the law as follows, l. c. 422 (169 U. S. l. c. 516):

> "The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a federal court, is not to be conclusively determined by the statutes of the particular state in which suit may be brought. One who is entitled to sue in a federal circuit court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action."

In the case of *Risty* v. *Chicago, R. I. & P. R. R. Co.,* 270 U. S. 378, 46 Sup. Ct. Rep. 236, this court, speaking through Mr. Justice Stone, declared the law as follows, l. c. 240 (270 U. S. l. c. 388):

> "* * * the test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts. *Smyth* v. *Ames,* 18 S. Ct. 418, 169 U. S. 466, 42 L. Ed. 819; *Chicago, B. & Q. R. R. Co.* v. *Osborne, supra.*"

There are a large number of decisions of the district courts and various circuit courts of appeal declaring the

same principle of law. We state this simply as bearing on the large number of decisions following this court in holding a legal remedy in the state court will not defeat the equity jurisdiction of a federal district court.

In the case of *City Bank Farmers Trust Company* v. *Schnader*, 291 U. S. 24, 29, 54 S. Ct. 259, this court said, l. c. 261:

> "As the statutory remedy, if it be treated as an action at law, would lie only in the state court and is not cognizable by the federal courts, either as an original action or by removability, its existence cannot oust federal equity jurisdiction. *Smyth* v. *Ames*, 169 U. S. 466, 516, 18 S. Ct. 418, 42 L. Ed. 819; *Chicago, B. & Q. R. R. Co.* v. *Osborne*, 265 U. S. 14, 16, 44 S. Ct. 431, 68 L. Ed. 878; *Risty* v. *Chicago, R. I. & Pac. Ry. Co.*, 270 U. S. 378, 388, 46 S. Ct. 236, 70 L. Ed. 641, *Mathews* v. *Rodgers, supra*, page 526 of 284 U. S., 52 S. Ct. 217."

SERIATIM ANSWER TO PETITIONERS' POINTS.

(Following Order in Petitioners' Brief.)

POINT A.

The Circuit Court of Appeals Properly Overruled Petitioners' Motion to Complete the Record.

It is now contended that error was committed in denying petitioners the right to have their motion to complete the record sustained and the record completed by adding thereto a provision of the policy insuring the real estate providing that the liability thereof should be proportionate to the total amount of insurance on said real estate.

In the first place, we do not believe petitioners properly preserved this point in the lower courts. They filed no such motion in the district court. They filed no such motion in the United States Circuit Court of Appeals until after an opinion had been handed down against them, when in connection with their motion for rehearing they filed such motion. (Tr. p. 19.) Coming so late it was not the duty of the United States Circuit Court of Appeals to pass on the merits of this motion. Such matters must be timely raised or the point is not entitled to consideration here. In the case of *Burnet* v. *Common Wealth Improvement Company*, 287 U. S. 415, 418, 53 S. Ct. 198, this court said (l. c. 199):

> "The board of tax appeals expressed no opinion concerning the commissioner's method of reckoning—it was not requested so to do. There the respondent relied entirely upon the second point. The circuit court of appeals ruled only on the same point. In such circumstances we do not undertake to determine what was not considered below."

The rule that a point will not be considered by this court on certiorari unless timely and properly raised below is well established. *Lynch* v. *United States*, 292 U. S. 571, 588, 54 S. Ct. 840, l. c. 847; *New York Dock Company* v. *Poznan*, 274 U. S. 117, 123, 47 S. Ct. 482, 485.

POINT B.

The Circuit Court of Appeals Properly Held That Complainant Could Maintain Its Bill in Equity Because It Had No Adequate Remedy at Law in the Federal Court.

(a)

Petitioners erroneously contend that if the circuit court of appeals is right in holding these two policies can

be aggregated, in an action brought thereon in the equity side of the federal court on the ground there is no legal remedy on the law side of that court—separate suits at law in a state court not being removable—that every state court suit for small installments due on policies whose face amount exceeds $3,000.00 would be removable.

Petitioners cite the case of *Wright* v. *Insurance Company,* 19 Fed. (2d) 117 (C. C. A. 5), 276 U. S. 602, as bearing out their contention that if the decision of the circuit court of appeals in this case is permitted to stand all insurance policies may be removed where future installments will amount to over $3,000.00. That case is directly against petitioners' contention. There it is held that the court does not have jurisdiction where the installments due amount to only $420.00 although the liability as to future installments in the aggregate amount to more than $3,000.00.

Further, in the case of *Healy* v. *Ratta,* 292 U. S. 263, 272, 54 S. Ct. 700, l. c. 704, this court held future installments of taxes could not be added to those already due to make up the jurisdictional amount where it was contingent whether the future illegal taxes would be collected. Future installments on insurance policies would always be contingent and could not be added to make up the jurisdictional amount.

Petitioners assert the above rule has no application to actions such as this is. They label this action a bill *quia timet* or bill of peace. They cite no authorities so holding and we have found none which establish

such exception. Furthermore, this is a bill in equity for cancellation and it partakes only slightly of the characteristics of bills of peace or *quia timet.*

Petitioners further urge that to apply this rule to this case would run counter to 36 Stat. 162, 28 U. S. C. A., Section 379, prohibiting federal courts from enjoining proceedings already pending in state courts. As we have pointed out (Point I) this action is for cancellation of two policies of insurance and an injunction against the prosecution of law actions on said policies. The matter comes squarely within the original equity jurisdiction of the United States District Court and the jurisdictional amount is involved. (Points I and III.)

The jurisdiction of the district court to grant the injunction prayed is based on the protection of its own original jurisdiction. This has always been held not to come within the provisions of the statute against injunctions just referred to.

In the case of *Julian* v. *Central Trust Company,* 193 U. S. 93, 112, 24 S. Ct. 399, this court said, l. c. 407:

> "In such cases, where the federal court acts in aid of its own jurisdiction and to render its decree effectual, it may, notwithstanding Section 720, Rev. Stat. (U. S. Comp. Stat., 1901, p. 581), restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction. *Sharon* v. *Terry,* 13 Sawy. 387, 1 L. R. A. 572, 36 Fed. 337, per Mr. Justice Field; *French* v. *Hay,* 22 Wall. 250, 22 L. Ed. 857; *Dietzch* v. *Huide-Roper,* 103 U. S. 494, 26 L. Ed. 497."

In the case of *Wells Fargo and Company* v. *Taylor*, 254 U. S. 175, 183, 41 S. Ct. 93, this court said, l. c. 96:

> "In recognition of this it has come to be settled by repeated decisions and in actual practice that, where the elements of federal and equity jurisdiction are present, the provision does not prevent the federal courts from enjoining the institution in the state courts of proceedings to enforce local statutes which are repugnant to the Constitution of the United States (citing cases) or prevent them from maintaining and protecting their own jurisdiction, properly acquired and still subsisting, by enjoining attempts to frustrate, defeat or impair it through proceedings in the state courts (citing cases) or prevent them from depriving a party by means of an injunction of the benefit of a judgment obtained in a state court in circumstances where its enforcement would be contrary to recognized principles of equity and the standards of good conscience. (Citing cases.)"

To the same effect holding the statute inapplicable where the object is to protect the original jurisdiction of the federal court, see *Looney* v. *Eastern Texas R. Co.*, 247 U. S. 214, 218, 38 S. Ct. 460, l. c. 462.

It is further contended that the ruling of the circuit court of appeals violates 36 Stat. 1163, 28 U. S. C. A., Section 384, which provides for trial by jury. In this, we believe petitioners are again in error. In the case of *Liberty Oil Company* v. *Condon National Bank*, 260 U. S. 235, 242, 43 S. Ct. 118, this court in an opinion by Mr. Chief Justice Taft, after referring to the Seventh Amendment to the Constitution, preserving jury trials in controversies exceeding $20.00, said, l. c. 121:

"Where an equitable defense is interposed to a suit at law, the equitable issue raised should first be disposed of as in a court of equity and then, if an issue at law remains, it is triable to a jury. *Massie* v. *Stradford*, 17 Ohio St. 596; *Dodsworth* v. *Hopple*, 33 Ohio St. 16, 18; *Taylor* v. *Brick Co.*, 66 Ohio St. 360, 366, 64 N. E. 428; Sutherland, Code Pl. and Pr., Section 1157. The equitable defense makes the issue equitable, and it is to be tried to the judge as a chancellor. The right of trial by jury is preserved exactly as it was at common law. The same order is preserved as under the system of separate courts. If a defendant at law had an equitable defense, he resorted to a bill in equity to enjoin the suit at law, until he could make his equitable defense effective by a hearing before the chancellor. The hearing on that bill was before the chancellor, and not before a jury, and if the prayer of the bill was granted, the injunction against the suit at law was made perpetual, and no jury trial ensued. If the injunction was denied, the suit at law proceeded to verdict and judgment. This was the practice in the courts of law and chancery in England when our Constitution and the Seventh Amendment were adopted, and it is in the light of such practice that the Seventh Amendment for it is construed."

To the same effect see *American Mills Company* v. *American Surety Co.*, 260 U. S. 360, 364, 43 S. Ct. 149, 151. *Banker* v. *Ford Motor Company*, 69 Fed. (2d) 665, 665 (U. S. C. C. A. 3rd).

(b)

Petitioners contend complainant's bill in equity fails to show reasonable grounds to apprehend that they will bring two suits at law in the state courts on these two policies and thereby harass and put respondent to ex-

pense. We first direct the court's attention to respondent's petition (Tr. p. 3) where it is alleged that petitioners procured the several policies involved as a part of a general plan and scheme to defraud this insurance company and thereafter, in furtherance of the scheme, petitioners set fire to this property for the purpose of collecting a large sum of money. Following that, the petition alleges:

> "That the said respondents have filed proof of loss against all of said companies, claiming a total loss, although said loss was not total, and that they have threatened to sue complainant upon the two policies issued by complainant as hereinbefore set forth, to recover the face amount of said policies."

These allegations must be taken as true. In the case of *State of Kansas* v. *State of Colorado*, 185 U. S. 125, 145, 22 S. Ct. 552, this court said, l. c. 559:

> "The general rule is that the truth of material and relevant matters set forth with requisite precision are admitted by demurrer . . . ."

In the case of *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 593, 43 S. Ct. 658, 663, this court said:

> "One does not have to await the consummation of tendered injury to obtain preventative relief. If the injury is certainly impending, that is enough."

We direct attention to the fact that under the statute (36 Stat. 1162, 28 U. S. C. A., Section 379) which petitioners cite at page 190 of their brief, the federal court could not enjoin proceedings already pending in the state court on these different policies. Petitioners

want to compel respondent to wait until petitioners bring their suits in the state court and when it is too late under the above statute for respondent to bring an action in equity. As authority for our contention that respondent did not have to wait until such actions were instituted in the state court and there was a legal certainty it would be compelled to defend such actions, we direct attention to the case of *Swift & Co.* v. *United States*, 276 U. S. 311, 326, 48 S. Ct. 311, where the court said, l. c. 315:

> "The argument ignores the fact that a suit for an injunction deals primarily, not with past violations but with threatened future ones; and that an injunction may issue to prevent future wrong, although no right has yet been violated. *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65, 82, 22 S. Ct. 585, 46 L. Ed. 808; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 536, 45 S. Ct. 571, 69 L. Ed. 1070, 39 A. L. R. 468."

See, also, *Standard Oil Company of New Mexico* v. *Standard Oil Company of California*, 56 Fed. (2d) 973, 976 (U. S. C. C. A. 10th).

In the case of *Vicksburg Water Works Company* v. *Vicksburg*, 185 U. S. 65, 82, 22 S. Ct. 585, this court said, l. c. 592:

> "It is further contended that the bill does not disclose any actual proceeding on the part of the city to displace complainant's rights under the contract, that mere apprehension that illegal action may be taken by the city cannot be the basis of enjoining such action, and that, therefore, the circuit court did right in dismissing the bill. We cannot accede to this contention. It is one often made in cases where bills in equity are filed to prevent anticipated and

threatened action. But it is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties; in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights."

Here the allegations show petitioners obtained these two policies as part of a general plan and scheme to defraud respondent and other insurance companies; that, thereafter, they caused the property to be set fire in furtherance of such scheme; that, thereafter, they filed proofs of loss with respondent and the other companies claiming a total loss and demanding the full face value of the policies. The bill then alleges that petitioners are threatening to institute actions at law in the state court to recover. As pointed out this allegation should be taken as true here. Furthermore, the facts following this conspiracy show there is danger of such action. To bring the conspiracy to fruition it is necessary for petitioners to collect. This can only be done by a suit since respondent refuses to voluntarily submit to the payment of its policies under the facts here. It cannot be seriously contended that there is no danger of more than one suit being filed because under the Missouri Code the actions on these two policies have to be separately maintained since petitioners are not jointly interested in both causes of action. Under the Missouri Code, actions can be joined only where all parties are interested in each separate cause of action or count there pleaded. (Sec. 865, R. S. Mo., 1929, *supra*.)

What is said with reference to an action for cancellation not being maintainable on matured notes, leases and nonnegotiable instruments refers to the situation where there is an adequate remedy at law. If there is only one instrument involved and one suit threatened, the remedy at law is adequate. Here, however, there must necessarily be two suits at law and the legal remedy is not adequate as shown herein under Point IV.

(c)

Where the requisite amount is involved and the matter comes within the original equity jurisdiction of the Federal District Court the jurisdiction of that court may not be defeated by an action at law in the state court. It may only be defeated by an adequate remedy at law on the law side of the federal court.

The case of *Cable* v. *United States Life Insurance Company*, 191 U. S. 288, and cases of that type are clearly distinguishable. In that case, there existed an adequate remedy at law on the law side of the federal court. The requisite amount was involved on the law side to permit of removal of the cause to the law side of that court.

In the case at bar these two policies for $3,000.00 and $1,500.00, respectively, could not be joined at law by respondent. There was, therefore, no way in which to get respondent's cause of action on the law side of the federal court since there was no adequate remedy on the law side of the federal court and since the matter was within the jurisdiction of the equity side of the federal

court, it follows that respondent was entitled to file its suit directly in the equity side of the federal court. The circuit court of appeals in so holding followed numerous decisions of this and other circuit courts of appeals.

In the case of *City Bank Farmers Trust Company* v. *Schnader*, 291 U. S. 24, 29, 54 S. Ct. 259, this court said, l. c. 261:

> "If the statutory remedy, if it be treated as an action at law, would lie only in the state court and is not cognizable by the federal courts, either as an original action or by removability, its existence cannot oust federal jurisdiction. *Smyth* v. *Ames*, 169 U. S. 466, 516, 18 S. Ct. 418, 42 L. Ed. 819; *Chicago, B. & Q. R. R. Co.* v. *Osborne*, 265 U. S. 14, 16, 44 S. Ct. 431, 68 L. Ed. 878; *Risty* v. *Chicago, R. I. & Pac. Ry. Co.*, 270 U. S. 378, 388, 46 S. Ct. 236, 70 L. Ed. 641; *Mathews* v. *Rodgers, supra*, page 526 of 284 U. S., 52 S. Ct. 217."

In the case of *Risty* v. *Chicago, R. I. & Pac. Ry. Company*, 270 U. S. 378, 388, 46 S. Ct. 236, this court said, l. c. 240:

> "The remedy by appeal to the state court under Section 8469 does not appear to be coextensive with the relief which equity may give. In any event, it is not one which may be availed of at law in the federal courts, and the test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedy afforded by the state courts. *Smyth* v. *Ames*, 18 S. Ct. 418, 169 U. S. 466, 42 L. Ed. 819; *Chicago, B. & Q. R. R. Co.* v. *Osborne, supra.*"

See, also, *Smyth* v. *Ames*, 169 U. S. 466, 18 S. Ct. 418, 69 Fed. (2d) 171, 176 (U. S. C. A. 8th) certiorari

denied, 292 U. S. 632, 54 S. Ct. 641. *American Mutual Liability Insurance Company* v. *McDonaugh*, 61 Fed. (2d) 558, 563 (U. S. C. C. A. 7th) (certiorari denied 288 U. S. 602), and numerous decisions of this and other courts cited in the above cases.

Respondents had no adequate remedy at law on the law side of this court. There was no way in which they could get this action into the law side of the federal court. Suit could not be maintained at law on both policies in the state court since not all the parties were interested in both actions. Petitioners had the right and in conformity to the Missouri Code must file two suits at law on these policies, neither of which would involve the jurisdictional amount to permit removal to the law side of the federal court. Since one suit in equity in the federal court could be maintained on both policies as heretofore pointed out it follows the right to maintain such suit cannot be defeated because of any supposed adequate remedy at law in the state court. There is no adequate remedy at law—in fact no remedy at law whatever—on the law side of the federal court. Hence, equity jurisdiction here cannot be defeated on the ground of an adequate remedy at law as shown by the above authorities.

(d)

Petitioners cite 1 Stat. 82 (Section 267 of the Judicial Code) 36 Stat. 1163, which provides that no suit in equity may be maintained in the courts of the United States in any case where "an adequate and complete remedy may be had at law." This section refers to an adequate remedy at law in the federal court. In the case of *Henrietta Mills*

v. *Rutherford County*, 281 U. S. 121, 126, 50 S. Ct. 270, this court in an opinion by Mr. Chief Justice Hughes referring to the section of the judiciary act with reference to adequate remedy at law (281 U. S. 121, 123, 126, 50 S. Ct. 270, 271) said, l. c. 272:

> "The act of Congress with respect to the existence of such a remedy has reference to the adequacy of the remedy on the law side of the federal courts (*Smyth* v. *Ames*, 169 U. S. 466, 516, 18 S. Ct. 418, 42 L. Ed. 819; *Chicago, B. & Q. Railroad Company* v. *Osborne*, 265 U. S. 14, 16, 44 S. Ct. 431, 68 L. Ed. 878; *Risty* v. *Chicago, R. I. & P. Railway Company*, 270 U. S. 378, 388, 46 S. Ct. 236, 70 L. Ed. 641) and in this case there would have been an adequate remedy at law, not only in the state court, but also in the federal court, if petitioners had been able to show a violation of the Federal Constitution. (Judicial Code, Section 24 (28 U. S. C. A., Section 41).)"

Furthermore, if it were material, it seems to us clear enough that any remedy at law would not be "as certain, complete, prompt and efficient to attain the ends of justice as the remedy in equity." *Keaton* v. *Little*, 34 Fed. (2d) 396, 398 (U. S. C. C. A. 10th) see, also, *Dawson* v. *Kentucky Distillers and Warehouse Company*, 255 U. S. 288, 296, 41 S. Ct. 272, 275 and *Risty* v. *Chicago, R. I. & P. Ry. Co.*, 270 U. S. 378, 388, 46 S. Ct. 236, 240. What is said by counsel for petitioners with reference to nonremovable cases constituting a ground for federal equity jurisdiction is extremely misleading. What this court has held in the many cases cited by us under (c)

supra, is that where the matter is within the original equity jurisdiction of a federal court and in equity the jurisdictional amount is involved, then the federal equity court clearly may take jurisdiction on the ground there is no adequate remedy at law in the federal court. What is said in the opinion of the circuit court of appeals here and in the other cases cited has reference to a situation where the matter is of equitable cognizance and the jurisdictional amount is involved in equity.

The statute does not limit the jurisdiction of the federal district court to cases where the jurisdictional amount is involved both at law and in equity. If the suit is properly in equity as here and the jurisdictional amount is involved in equity, as it is here, then the case may not be thrown back into the state court merely because the jurisdictional amount would not be involved if complainant were attempting to maintain the action at law.

(e)

Petitioners urge that a bill for cancellation of this type should be added to the list of exceptions where this court has declined jurisdiction on the ground there were adequate remedies in the state law courts. An examination of those cases will show this case does not conform to the type of cases grouped under the exceptions. The federal courts are very reluctant to interfere with revenue acts of the state, rate enforcement cases, state judgments, and habeas corpus proceedings, where the state courts do have jurisdiction and have exercised that jurisdiction. In other words, the federal

courts are reluctant to interfere with the operation of state governments. *Bowley* v. *Chicago & N. W. Ry. Co.*, 68 Fed. (2d) 527, 528 (certiorari denied), 54 S. Ct. 716. They are not, however, reluctant to protect their own jurisdictions by injunction or otherwise in cases like the one at bar, which properly comes within the jurisdiction of the federal court. Here the suit in equity in the federal court was filed before any action was taken in the state court. The matter was within the jurisdiction of the federal court and as shown by the authorities (Point I) the federal courts have not hesitated under such circumstances to protect their own jurisdiction by appropriate means. There is no reason to add this case to the group where the parties are relegated to their remedy in the state court as this case has no characteristics in common with the cases placed in such exception.

(f)

This case does properly come within the equitable jurisdiction of the federal court as heretofore pointed out. (Point I.) We here desire to call attention to the inconsistency of petitioners under Point E. Where it best suits their purpose they refer to actions like ours as "bills for cancellation," under this heading they refer to it as a "bill *quia timet.*" It is our contention that this action is a bill for cancellation and not a bill *quia timet* although possibly having some of the characteristics of such latter action. (See Point C(a).)

POINT C.

The Circuit Court of Appeals Properly Held There Was Equitable Jurisdiction for Cancellation Reinforced by the Ability to Avoid a Threatened Multiplicity of Suits.

(a)

Petitioners seek to label this action a bill of peace under this heading and charge that such an action may not be maintained until respondent's rights are first established at law. At page 24 of their brief, the page preceding the one to that where they contend this is a bill of peace, petitioners classify this action as a bill for cancellation and ask this court to catalogue bills for cancellation under the exceptions to federal equitable jurisdictions such as revenue enforcement cases, state court judgments, etc. It is our position that this is essentially a bill for cancellation with the incidental feature of an injunction supplementing the remedy by cancellation.

As pointed out under (c) of Point C of this brief it is apparent that petitioners cannot join both suits at law but will have to maintain two law actions if they seek to recover on both policies.

We contend this is not primarily a bill of peace and that the rule requiring prior adjudication at law does not apply to a case like this where the avoidance of multiplicity of suits is merely incidental and used only to give protection after the court has decreed cancellation.

Furthermore, even where the action is solely a bill of peace and that is the only equity involved, the rule

requiring a prior adjudication has been greatly relaxed. Petitioners cite 21 C. J., Section 50, page 77. It is there stated:

> "But relief has frequently been afforded without awaiting a trial and judgment at law, particularly in the case of repeated *prima facie* trespasses, waste or where a plaintiff's title is admitted or not converted. The rule has been said to be one of expediency and policy rather than an essential condition of equitable jurisdiction."

Here, if respondent had waited until there had been an adjudication at law, it would have lost its right to bring this bill in equity because 36 Statute 1162, 28 U. S. C. A., Section 379, prohibits federal courts from enjoining proceedings already pending in state courts. This situation should certainly come within the exception, even if this were strictly a bill of peace, otherwise, respondent's right to equitable relief would be entirely destroyed.

(b)

Petitioner's contention there can be no multiplicity of suits is entirely fallacious. It is at once apparent that petitioners cannot join the two distinct claims here involved in one suit. Petitioner, Mary Di Giovanni, has no interest in the suit to recover on the policy of insurance on the personal property. Since not all the parties are interested in the subject matter of actions on the two policies they cannot be joined in one suit even under separate counts.

> Sec. 765. Causes of Action That May Be United in the Petition.—The plaintiff may unite in the same petition several causes of action, whether they

be such as have been heretofore denominated legal or equitable or both, where they all arise out of: First, the same transaction or transactions connected with the same subject of action; or, second, contract, express or implied; or, third, injuries, with or without force, to person and property, or either; or, fourth, injuries to character; or, fifth, claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same; or, sixth, claims to recover personal property, with or without damages, for the withholding thereof; or seventh, claims by or against a party in some representative or fiduciary capacity, by virtue of a contract, or by operation of law. But the causes of action so united must all belong to one of these classes, *and must affect all the parties to the action*, and not require different places of trial, and must be separately stated, with the relief sought for each cause of action, in such manner that they may be intelligibly distinguished. (R. S., 1919, Section 1221.) (Italics ours.)

There must, therefore, be two suits filed, if petitioners seek to recover on both policies. It is suggested that the defendant will have the same control over the cases in the state court as the plaintiff. This is fallacious on its face. The plaintiff has the right to institute these actions in any court having jurisdiction when it chooses and in whatever order it chooses. In the regular course, such actions are tried in the order in which plaintiff chooses to file them and the defendant has no choice in the matter, but is at the mercy of the plaintiff as to when, where and in what order the claims will be litigated.

It was also contended that if the suit on the building policy in which both petitioners are involved were tried first, then the judgment in that suit would be *res adjudicata* against Pete Di Giovanni. This statement is not en-

titled to be taken at face value. In the first place, petitioner could file a motion for a new trial and subsequently take an appeal in that case, thereby suspending said judgment and preventing the same becoming a final judgment. The defense of *res adjudicata* can be sustained only upon proof of a final judgment.

In the case of *Bodkin* v. *Edwards*, 255 U. S. 221, 223, 41 Sup. Ct. Rep. 268, this court said, l. c. 268:

> "Bodkin then took a further appeal to this court, the decision of the circuit court of appeals not being final under Section 128 of the Judicial Code. (Comp. St. 1120.)"

In the case of *Merriam* v. *Saalfield*, 36 Sup. Ct. Rep. 477, 241 U. S. 22, this court declared the law as follows, l. c. 28:

> "But it is familiar law that only a final judgment is *res adjudicata* as between the parties, and it is evident that a decree cannot be *res adjudicata* as against a third party participating in the defense unless it is so far final as to be *res adjudicata* against the defendant himself. Hence, if the decree of September 11th was not final as between appellant and Saalfield, it cannot be *res adjudicata* as against Ogilvie; and thus the fundamental ground for proceeding against the latter by supplemental bill with substituted service of process disappears. This sufficiently shows the weakness of appellant's position, which, upon analysis, is found to be this: that, upon the theory that Ogilvie would be estopped from a final decree if and when made, it sought to bring him into the suit, before final decree, as if he were already estopped. However convenient this might be to a complainant in appellant's position, it is inconsistent with elementary principles."

As already stated, there is no certainty that the building policy in which both petitioners are interested will be tried first. Petitioners have the sole power of choice in this matter and can file the personal property suit first and try the same first if they choose. There is no rule of practice or procedure which enables defendant to govern the order in which the cases are tried. Further, there is no rule of practice or procedure which entitles defendant to a stay in the second suit until the first suit can be finally adjudicated and the defense of *res adjudicata* made available. The result, therefore, is that petitioners can force the defendant to go to the trouble and expense of trying both cases, even though defendant is successful in the first. If the cases are tried practically at the same time, petitioners can also put the defendant to the expense of an appellate review of both cases, either as appellant or appellee. Upon analysis, therefore, the defense of *res adjudicata* is seen to be of no practical value in shielding defendant from the necessity of defending both actions.

It is further contended that it will be time enough to file a bill in equity to prevent a multiplicity of suits when it actually appears that there will be a multiplicity. The fallacy of this argument is pointed out by petitioners themselves at pages 11 and 19 of their brief where they cite 36 Stat. 1162, 28 U. S. C. A., Section 379, prohibiting federal courts from enjoining proceedings already pending in state courts. Petitioners would compel us to delay this action until the statute prohibits the district court from granting us the relief

sought. The mere statement of this proposition demonstrates its unsoundness.

Under the law of Missouri, which governs here, as it is probable the two actions at law will be instituted in that state, defendant cannot avoid defending two suits at law on these two policies unless petitioners choose to maintain only one action at a time. The very purpose of the equitable remedy is to save a defendant from this predicament.

(c)

Petitioners contend that if Pete Di Giovanni's suit on the personal property policy is tried first and defeated, it will prevent the maintaining of a suit on the real property policy by husband and wife as tenants by the entirety. In the first place, Pete Di Giovanni can file a motion for a new trial and appeal his case, thereby suspending said judgment and preventing it becoming a final judgment available as a defense under pleas of *res adjudicata* until after defendant had been compelled to stand trial in the second case on the real property policy. Furthermore, the defense of *res adjudicata* as to Pete Di Giovanni would not be available against either him or his wife in an action maintained by them as tenants by the entirety. The case of *Stifel's Union Brewing Company* v. *Saxy*, 273 Mo. 159, 201 S. W. 67, declares the law of Missouri to be that property held by the entirety is not subject to the debts of either tenant by the entirety. This demonstrates the separate nature of the titles of persons holding by the entirety. As the interest of the wife in such case is

not affected by a judgment against her husband then it follows she would not be barred of her rights because a defense of *res adjudicata* would be good against her husband alone. It is the law of Missouri that where persons have a joint estate or joint interest in property, a defense good as against one of them only is not available in a suit brought by them jointly. In the case of *Herrell* v. *St. Louis-San Francisco Ry. Co.*, 324 Mo. 38, 23 S. W. (2d) 102, the Supreme Court of Missouri *in banc* held the defense of contributory negligence of the father was not available in action brought by the mother and father jointly for the death of their minor son. The case of *Fulbright* v. *Phoenix Insurance Company*, 329 Mo. 207, 44 S. W. (2d) 115, simply holds that a husband who obtains insurance representing himself as the owner in fee of the real estate insured has misrepresented the title he cannot recover in a suit maintained by him alone where it appears he holds title with his wife by the entirety.

POINT D.

The Bill Alleged the Face Value of the Two Policies Was $3,000.00 and $1,500.00 Respectively. The Bill Alleged Petitioners Were Claiming a Total Loss and Demanding the Full Face Value of the Policies. The Jurisdictional Amount Was, Therefore, Involved.

Petitioners seek to get before this court, by their motion to complete the record, the provision of the real estate insurance policy for $3,000.00 involved here to the effect that liability under that policy would be proportionate to the total amount of insurance carried. As we

have already pointed out, no attempt was made to get this provision in the record until after the opinion of the circuit court of appeals was rendered against petitioners. We believe the point was not properly preserved and will not be considered by this court but even if that provision were before this court there is no merit in petitioners' contention.

Respondent alleges petitioners are claiming a total loss and are demanding the full face of the policy. These allegations should be accepted as true as petitioners admit. *Grand Chute* v. *Winnegar,* 15 Wall. (U. S.) 373, 376, 21 L. Ed. 174, cited by petitioners. (Br. p. 28.)

The fact that on a trial respondent might be able to convince the jury that the property was not worth more than $6,000.00 and might successfully maintain its defense that it was only liable for a proportionate part of the loss depending on the proportion of its coverage to the total coverage does not eliminate the fact that the amount in dispute is the full face of the policies or $4,500.00. The possibility respondent might establish the defenses mentioned does not cut down the amount involved. Respondent may not be forced out of the federal court on the theory less than the jurisdictional amount is involved as long as it is exposed to the danger of a judgment greater than the jurisdictional amount unless it is successful in maintaining defenses cutting the amount down. In the case of *Schunk* v. *Moline, Milburn & Stoddard Company,* 13 S. Ct. 416, 147 U. S. 500, 504, this court said:

"Although there might be a perfect defense to the suit for at least the amount not yet due, yet the fact of a defense, and a good defense, too, would not affect the question as to what was the amount in dispute. Suppose an action were brought on a non-negotiable note for $2,500.00, the consideration for which was fully stated in the petition, and which was a sale of lottery tickets, or any other matter distinctly prohibited by statute, can there be a doubt that the circuit court would have jurisdiction? There would be presented a claim to recover the $2,500.00; and, whether that claim was sustainable or not, that would be the real sum in dispute. In short, the fact of a valid defense to a cause of action, although apparent on the face of the petition, does not diminish the amount that is claimed, nor determine what is the matter in dispute; for who can say in advance that that defense will be presented by the defendant, or, if presented, sustained by the court?"

Furthermore, respondent alleges in its bill that the face of the policies aggregated amounts to $4,500.00, that petitioners claim a total loss and are demanding the full face value of the policies. (Tr. pp. 1-4.) The petition charges there is involved the sum of $4,500.00. This court has repeatedly ruled as petitioners admit (Petitioners' Brief pp. 30 and 31) that the amount claimed is the amount in dispute unless it conclusively appears from the face of the pleadings that a less amount is involved.

In the case of *Barry* v. *Edmunds*, 6 Sup. Ct. Rep. 501, 116 U. S. 550, where this court said, l. c. 559:

"The order of the circuit court dismissing the cause on this ground is reviewable by this court on writ of error by the express words of the act. In making such an order, therefore, the circuit court

exercises a legal and not a personal discretion, which must be exerted in view of the facts sufficiently proven, and controlled by fixed rules of law. It might happen that the judge, on the trial or hearing of a cause, would receive impressions amounting to a moral certainty that it does not really and substantially involve a dispute or controversy within the jurisdiction of the court. But upon such a personal conviction, however strong, he would not be at liberty to act, unless the facts on which the persuasion is based, when made distinctly to appear on the record, create a legal certainty of the conclusion based on them. Nothing less than this is meant by the statute when it provides that the failure of its jurisdiction on this account 'shall appear to the satisfaction of said circuit court.' "

Furthermore, when the bill alleges on its face the jurisdictional amount is involved the burden is on the defendant to prove less than the jurisdictional amount is involved. See *Healy* v. *Ratta*, 292 U. S. 263, 271, 54 S. Ct. 700, 704, *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322, 333, 27 S. Ct. 529, 532.

In the case of *Wetmore* v. *Rymer*, 18 Sup. Ct. Rep. 295, 169 U. S. 115, this court stated the law as follows, l. c. 128:

"Applying the law as heretofore stated by this court, in the cases cited, that a suit cannot be properly dismissed by a circuit court as not substantially involving a controversy within its jurisdiction, unless the facts, when made to appear on the record, create a legal certainty of that conclusion, we conclude that, in the present case, the want of jurisdiction was not made clear, and that the evidence before that court did not warrant the dismissal of the action for the want of jurisdiction.

The judgment of the circuit court dismissing the action is accordingly reversed, and the cause is remanded with directions to restore the judgment on the verdict."

In the case of *Put-in-Bay W. L. & R. Co.* v. *Ryan*, 181 U. S. 409, 431, 21 S. Ct. 709, this court said, l. c. 717:

> "And it has been several times decided by this court that a suit cannot properly be dismissed by a circuit court as not involving a controversy of an amount sufficient to come within its jurisdiction, unless the facts, when made to appear on the record, create a legal certainty of that conclusion. *Barry* v. *Edmunds*, 116 U. S. 550, 29 L. Ed. 729, 6 Sup. Ct. Rep. 501; *Wetmore* v. *Rymer*, 169 U. S. 115, 42 L. Ed. 682, 18 Sup. Ct. Rep. 293."

In the case of *Beecher* v. *Pan-American Life Insurance Company*, 73 Fed. (2d) 263, the Circuit Court of Appeals for the 5th Circuit said, l. c. 264:

> "The court is not chargeable with error in refusing to dismiss the suit as not involving a controversy of an amount sufficient to come within its jurisdiction, unless the facts, when made to appear on the record, create a legal certainty of that conclusion. *Put-in-Bay Waterworks, etc., Co.* v. *Ryan*, 181 U. S. 409, 431, 21 S. Ct. 709, 45 L. Ed. 927; *Wetmore* v. *Rymer*, 169 U. S. 115, 122, 128, 18 S. Ct. 293, 42 L. Ed. 682."

Under the ruling of the above cases it seems apparent petitioner's contention is without merit. We submit that it does not appear to a legal certainty on this record that an amount less than the jurisdictional amount is herein involved.

POINT E.

The Circuit Court of Appeals Properly Held the Two Claims Arising under the Two Policies of Insurance Could Be Tied Together for the Purpose of Ascertaining the Amount Involved for Jurisdictional Purposes.

(a and b)

The issues under this heading have been discussed by us under Point III, a and b, to which we refer this court.

For all the reasons suggested herein, we respectfully submit that the opinion and decision of the circuit court of appeals in this case was right and should be affirmed by this court.

Respectfully submitted,

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